Supreme Court, U.S.
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No. 86 - 584

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CALIFORNIA,

Petitioner,

v.

CHARLES TYBERG,

Respondent.

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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Charles Tyberg respectfully requests that this Court deny the State of California's petition for writ of certiorari seeking review of the unpublished opinion of the California Court of Appeal, Fourth District, Division Three.

STATEMENT OF ADDITIONAL FACTS

In addition to the facts stated in the petition, other circumstances of the interrogation of Charles Tyberg are relevant to the question of the voluntariness of the confession.

The petition notes that Charles Tyberg was arrested

at his home. (Petition, p. 12). The circumstances of that arrest were that at 6:15 a.m. on March 27, 1983, Charles' father, Sheriff's Sergeant James Tyberg[1] was interviewed at the Santee Sheriff's substation. The police seized his .357 magnum revolver and patrol car. Sergeant Tyberg then took the police to his home and woke up Charles saying, "Wake up, Charles, these men want to talk to you." Defendant was advised of his constitutional rights, but not questioned while at home. He was then taken to the police station and turned over to Detective Ron Newman. (Court of Appeal Opinion, reported at pages A-6 - A-7 in the appendix to the petition).

Petitioner's statement of facts accurately recites the representations then made by Newman to obtain the confession. (Petition, pp. 13-17). During that interrogation, at 8:33 a.m., Attorney Richard Songer called the San Diego Police Department and notified them he had been contacted by defendant's parents to talk with the minor before he made any statements. (Court of Appeal Opinion, page A-15 of the appendix to the petition). Songer was told the homicide division was "closed"; at a homicide sergeant's direction, the police operator lied to Songer, telling him no one in homicide was answering the phone. (Court's Pretrial Ex. 5, pp. 1-3). Songer left a message that he did not want any further questioning of his client until he had an opportunity to talk with him, and hung up to come to the police station. Various police employees, including the lieutenant on duty, then discussed how to stall him at the police sta-

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[1]The petition repeatedly and inaccurately refers to Sgt. Tyberg as Charles "stepfather." James Tyberg is Charles' father, as Charles is his adopted son. (Calif. Civil Code § 228).

tion. (Court's Pretrial Ex. 5, pp. 4-7).[2]

During the questioning Newman left the interview room to get a second tape recorder. When Newman returned to the interview room, he told the defendant he wanted to tape record his statement of what happened the night of the shooting (pretending he had not been doing so). Newman readvised defendant of his constitutional rights. When asked if he was willing to talk, Charles responded, "Ah, ah, I think I better get a lawyer." Newman asked ". . . have we made you any promises tonight at all to get to talk about this? Defendant replied, "Ah, you said you was going to help me." The interrogation concluded at 9:05 a.m. (Court of Appeal Opinion, pages A-14 - A-15 of the appendix to the petition).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION. "NON-COERCIVE" TACTICS, ARE, OF COURSE, PERMISSIBLE, BUT COERCIVE TACTICS ARE NOT.

The state has phrased the question presented as whether "officers may constitutionally employ non-coercive psychological tactics" in order to secure a confession. The answer to that question is obvious: officers may use non-coercive tactics to obtain a confession. But that question is not presented here: Charles Tyberg has never claimed, and the California Court of Appeal did not decide, that non-coercive tactics were prohibited. The California Court of

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[2]The trial court suppressed all statements made by defendant after Songer's call was received by police communications. The California Court of Appeal did not rely on

Appeal found that the particular tactics used here, including a representation that the officers were there to help, were coercive. The answer to the question of whether coercive psychological tactics may constitutionally be used to obtain a confession is, just as obviously, no.

The real question which was presented to the California Court of Appeal, and decided by that court, was whether or not the police representations that they were there to "help" a juvenile suspect who was introduced to them by his father, a law enforcement officer, had a psychologically coercive impact. That is an important question for this case, but it has no broad impact, because it is so specific to the facts of this case. And, as argued below, the voluntariness question was decided correctly by the Court of Appeal on the basis of California, as well as federal law. Certiorari should not be granted to decide the non-issue phrased as the "Question Presented" in the petition.

II.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL RESTS ON ADEQUATE STATE GROUNDS.

While the California Court of Appeal decision makes some reference to general federal principles that age of the minor and psychological impact of the questioning must be considered in reviewing the voluntariness of a confession, the major reliance of the opinion is on California state

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this conduct in finding the earlier part of the confession involuntary.

law. State law was an adequate and independent ground for the Court of Appeal decision. Citing exclusively to California cases, including People v. Honeycutt (1977) 20 Cal.3d 150, 158-161 [141 Cal.Rptr. 698, 570 P.2d 1050], the opinion recites the officer's false assurances and representation of help, and concludes: "This type of 'softening-up' and deception to induce a confession has been expressly disapproved by the courts as constituting improper pressure and alone requires reversal." (Opinion, p. A-26 of appendix to the petition.) Later, the opinion notes that Charles Tyberg relied on the officer's assurance of help in agreeing to talk, and quotes People v. Jimenez (1978) 21 Cal.3d 595, 611 [147 Cal.Rptr. 172, 580 P.2d 672] for the proposition that a confession is involuntary if it was elicited by any promise of benefit or leniency. (Opinion, p. A-28 of appendix to the petition.) People v. Jimenez establishes for California a stricter standard for the proof of voluntariness than is required by federal law. While the Court of Appeal opinion here did not find it necessary to rely on that stricter standard (See Opinion, ftn. 4, pp. A-22 - A-23 of the appendix to the petition), its reliance on Jimenez' substantive holding is a clear statement that the court was independently relying on California law. This opinion contains the "plain statement" that the decision rests upon adequate and independent state grounds which is required by Michigan v. Long (1983) 463 U.S. 1032, 1042. Citation to a state case which itself sets a higher standard than federal law requires for the protection of the privilege against self-incrimination is one of the plainest ways a court can indicate its reliance on state law.

Miranda v. Arizona (1966) 384 U.S. 436 and Miller

v. Fenton (1985) __ U.S.__ [88 L.Ed.2d 405; 106 S.Ct. 445], are cited in the opinion for their broad general principles. Every other citation of a federal case is either followed by the citation of one or more California cases independently standing for the same principles, or is a part of a long quotation from a California case. Nowhere does the opinion place any significant reliance on federal law. This use of the federal cases indicates they are being used only for the purpose of guidance, and do not themselves compel the result the court has reached. (See Michigan v. Long, supra, 463 U.S. at 1041).

Nor can there be any claim here that the California constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. It is settled law that the California Constitution contains an independent privilege against self-incrimination which provides greater protection to the individual than is required by the Federal Constitution. (Ramona R. v. Superior Court (1985) 37 Cal.3d 802, 809-810 [210 Cal.Rptr. 204, 693 P.2d 789]; People v. Navarez (1985) 169 Cal.App.3d 936, 945, [215 Cal.Rptr. 519]).

Therefore, the California Attorney General has failed to demonstrate that there is a federal question presented here, and certiorari should be denied.

III.

WHATEVER THE POTENTIAL ISSUES OF POLICE TRICKERY WHICH MAY SOMEDAY BE PRESENTED TO THIS COURT, A REPRESENTATION THE POLICE ARE THERE TO "HELP" A JUVENILE SUSPECT BY INTERROGATING HIM IS OBVIOUSLY COERCIVE. THIS CASE INVOLVES NONE OF THE DIFFICULT QUESTIONS.

The California Attorney General attempts to describe this case as one involving subterfuge and trickery, but not such subterfuge and trickery which would cause an innocent person to confess. The petition goes on to discuss some of the difficult issues which can be presented by police trickery during interrogation, and therefore claims this is an appropriate case for this Court's review. (Petition, pp. 21-27). But none of those difficult issues are presented here. The police here used various forms of lying to Charles Tyberg to obtain the confession, and those were properly considered by the California Court of Appeal in its review of the totality of the circumstances. But the primary reason for the finding of involuntariness was the officers' representations that they were there to "help." As established in prior decisions by this Court, any offer of "help," even if it were genuine, would be coercive, and of course here it was not genuine.

In Leyra v. Denno (1954) 347 U.S. 556 a police psychiatrist's claim, "I want to see if I can help you" when his real purpose was to get a confession was one of the factors making not only that confession but also subsequent confessions inadmissible under the traditional, pre-Miranda voluntariness standards. A confession is not free and voluntary unless the suspect understands the adversary role

of the person to whom he is confessing. Whether the person is a psychiatrist or a police officer, a suspect is not going to understand that adversary role if the interrogator says he is there to help.

Similarly in Spano v. New York (1959) 360 U.S. 315, 323 [3 L.Ed.2d 1265; 79 S.Ct. 1202] this Court found that one important factor in its conclusion a confession was involuntary was the use, during the interrogation, of a police officer who had been a childhood friend of the defendant's. So this Court has dealt with the issue of "non-specific offers of aid": such offers are an important factor in finding a confession involuntary. The California Court of Appeal opinion here is an application of this existing law to these facts: the case presents no new issues of law for this Court's determination.

Nothing in Miller v. Fenton, (3rd Cir., 1986) 796 F.2d 598[3] relied on by the California Attorney General, changes this existing law. In Miller, the court recognized that excessive friendliness could well cause a suspect to forget his questioner had an adversarial role, but concluded that because Mr. Miller was a mature man who made remarks indicating he knew this was an ordinary police interrogation, that danger had not occurred. This case is readily distinguishable: Charles Tyberg was not a mature man, but a sixteen-year-old boy on the day he was questioned. Far from indicating he knew this was an ordinary police interrogation, Charles Tyberg asked permission to go home with his father after he confessed (See petition, pp. 17-19), and concluded the interview by stating, "Ah, you said you were

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[3]A petition for certiorari was pending in the Miller case at the time this brief in opposition was prepared. The June 1986 opinion discussed here is the Court of Appeals' opinion

going to help me." The offer of help here did have an overbearing effect on Charles Tyberg's will.

Miller v. Fenton also has no bearing on whether review should be granted here because of its entirely different procedural posture. That case was a collateral attack on a New Jersey state conviction: the habeas corpus petitioner had the burden of proving involuntariness by a preponderance of the evidence. This case arises on direct review of a state judgment: the prosecution has the burden of proof of voluntariness. (See Opinion, footnote 4, pp. A-22 - A-23 of appendix to the petition.) Because of the factual differences, it is doubtful that Miller v. Fenton conflicts with the decision here, but even if there were a conflict, it would be between New Jersey and California law. As long as the law of both states complies with the minimum requirements of the United States Constitution, any conflict is a permissible difference between the law of different states, and it would not be appropriate or necessary for this Court to review it.

A factually closer case is Woods v. Clusen (7th Cir., 1986) 794 F.2d 293, where habeas corpus relief was granted to a petitioner whose confession was obtained by a combination of lies and fatherly overtures, during an interrogation occuring when he was 16 years of age. Woods v. Clusen reaffirms the well-established principle that when juveniles are involved, great care must be taken to assure their admissions are voluntary, citing Haley v. Ohio (1948) 332 U.S. 596. Haley v. Ohio is important for another part

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on the voluntariness question rendered after this Court's 1985 decision remanding the case for further proceedings.

of its holding that is relevant to this case: police refusal to let an attorney see a juvenile in custody is relevant to the evaluation of voluntariness, even when the police conduct occurs after the confession is obtained. The California Court of Appeal did not need to even consider this factor in its decision, but it must be included in any overall review of the totality of the circumstances here.

This case turns on its unique facts, involving no broad holding, which is why the opinion is not published.[4] Each of the various factors considered by the California Court of Appeal is a proper factor in the voluntariness equation, and therefore there is no reason to grant certiorari in this case.

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[4]Rule 976(b) of the California Rules of Court specifies the standards for publication of Court of Appeal opinions:

> No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:
>
> (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
>
> (2) resolves or creates an apparent conflict in the law;
>
> (3) involves a legal issue of continuing public interest; or
>
> (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

CONCLUSION

The petition here does not raise an important federal question; because the decision below is based on an adequate and independent state ground, it raises no cognizable federal question at all. The petition for writ of certiorari should be denied.

DATED: November 3, 1986

Respectfully submitted,

APPELLATE DEFENDERS, INC.

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